(14)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 691

OGDEN H. HAMMOND, JR., *Petitioner*,

v.

EDYTHE STERLING HAMMOND, *Respondent*.

BRIEF OF RESPONDENT, EDYTHE STERLING HAMMOND, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 113-115) is reported in 131 (F. 2d) 351.

SUMMARY OF ARGUMENT.

POINT ONE. The Municipal Court of the District of Columbia did not err in refusing to accept expert testimony as to foreign law.

POINT TWO. The United States Court of Appeals for the District of Columbia did not misapply the law of New York.

POINT THREE. There was no overpayment by petitioner as alleged, and even if true, said alleged overpayment amounted to a mistake of law for which there can be no recovery.

ARGUMENT.

POINT ONE.

The Municipal Court of the District of Columbia did not err in refusing to accept expert testimony as to foreign law.

Petitioner complains that the Trial Court refused to permit expert testimony as to the law of New York. Reference to the trial record shows that Appellant's Counsel acceded at the trial to the Court's suggestion to submit briefs on the law of New York (R. 32). Only with regard to the admissibility of the three self serving "lawyer" letters written by petitioner after the institution of this action (R. 82-88), did petitioner tender Attorney Stammler, petitioner's present attorney, as an expert on New York law (R. 46-48). Inasmuch as the admissibility of evidence is governed by the law of the forum (Restatement of the Law of Conflicts of Laws, Section 597) and not by the law of New York, where the agreement was made, the Trial Court was perfectly correct in refusing to hear "expert" testimony on the law of New York as to the admissibility of these letters.

Even if petitioner had made a proper offer at the trial to prove by "expert" testimony New York law as to the party's substantive rights under the separation agreement, the Trial Court would have been justified in excluding it.

In the first place, petitioner did not plead the New York law in his answer. If, as petitioner's Attorney argues, the New York law is deemed "foreign" law in the Municipal Court of the District of Columbia, and is not judicially noticed, then it must be pleaded if the party seeks to prove it as a fact.

Restatement of the Law of Conflicts, Sec. 621
49 Corpus Juris, p. 153
20 American Jurisprudence, p. 71
1 Chitty, Pleadings, p. 238, note (o).
134 A. L. R. 570, at 571.

Secondly, it was improper and undesirable to offer proof of the law of one of the states in a Court of the United States, since the laws of all the states are the subject of judicial notice by the Courts of the United States.

> *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751; 30 L. Ed. 825.
> *Andrus* v. *People's Bldg. Loan and Savings Ass'n.*, 36 C. C. A. 336, 94 Fed. 575.

This applies to the Courts of the District of Columbia.

> *Moore* v. *Pywell*, 29 App. D. C. 312, 9 L. R. A. (N. S.) 1078.

None of the authorities cited in petitioner's brief sustains his contention that the Municipal Court is not a "court of the United States." In *O'Donoghue* v. *United States*, 289 U. S. 516, cited by petitioner, the Supreme Court was not at all concerned with the lessor courts of the District of Columbia, nor did it mention them. There the issue was merely whether the Supreme Court and this Court are constitutional courts insofar as the Justices were entitled to the protection of Article 3, Section 1, of the Constitution.

In *Hanley* v. *Donoghue*, 116 U. S. 1, referred to by petitioner, the Supreme Court stated on page 5:

> "When exercising an original jurisdiction under the Constitution and laws of the United States, this Court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of the United States * * *." (Italics ours.)

The reason for applying this rule was clearly stated in a recent decision. *Cray, McFawn & Co.* v. *Hagarty, Conroy & Co., Inc., et al.*, 27 F. Supp. 93, affirmed 109 F. (2d) 443. There the court stated at page 95:

> "For the accepted rule almost since the beginning of our federal jurisprudence has been that the law of any state of the Union, whether statutory or the result of judicial decisions, is a matter of which the courts of

> the United States may take judicial notice without plea or proof, because the laws of the several states cannot in courts of the United States be regarded as foreign laws. * * *'' (Italics ours.)

This reasoning is equally applicable to the Municipal Court of the District which is a court of record created by the Congress of the United States (District of Columbia Code of 1940, Sec. 11-702; March 3, 1921, 41 Stat. 1310, ch. 125, Sec. 2).

None of the other cases cited by petitioner in his first point, it is respectfully submitted, support his position. In fact, he has misconstrued his position, for it does not involve a question as to whether or not the Municipal Court of the District of Columbia is an inferior tribunal, but merely a question of whether or not expert testimony as to foreign law should have been taken by the Municipal Court instead of a procedure which has been followed by the courts of the District of Columbia from time immemorial. The United States Court of Appeals for the District of Columbia felt that the question was so devoid of merit and so elementary that, in its opinion it did not even comment on this point raised by the petitioner in his appeal to that court.

POINT TWO.

The United States Court of Appeals for the District of Columbia did not misapply the law of New York.

Petitioner contended that he was not chargeable with arrears of payments due under the agreement because his wife has refused to allow him partial custody of the child in accordance with the agreement. By the law of New York, the custody provision is a material part of the contract, and a breach by the wife without justification will bar recovery by her, *Duryea* v. *Bliven*, 122 New York 567, 25 N. E. 908, but in this case the undisputed facts show that petitioner made no request or demand for custody during the years 1938, 1939 and 1940. It was not until 1941, when the respondent demanded that he pay over the amounts due her under the

agreement or stand suit, that he intimated his desire to have the child spend part of the summer with him at his father's home, and it was not until after this action was brought that he actually made a definite and positive demand. This was too late to alter respondent's rights. The sums in question here were due in the years 1939 and 1940. During those years, there was no breach of the agreement by the wife, and nothing to show that she would not have complied with a demand by the husband. None having been made, the rights of each of the parties under the agreement became fixed and definite upon the filing of suit, and possible defenses acquired subsequently are of no avail. *Mavian* v. *Majestic Photo, Inc.*, 19 N. Y. Supp. (2d) 677, *Dickey* v. *Turner*, 49 F. (2d) 998; *Pearlman* v. *Newburger*, 117 Pa. Super. 328, 178 A. 402.

Moreover, the obligations of the petitioner and respondent under the agreement were mutual and reciprocal. Hence, while petitioner's breach continued, he was in no position to demand performance by respondent. *Rice* v. *Fidelity & D. Co.*, 103 Fed. 427; *Cresswell Ranch &c. Co.* v. *Martindale*, 63 Fed. 84. And this would be true even in a case in which the delinquent party acted in good faith. "The rights and remedies of parties for the breach of civil contracts ought not to be so placed at the mercy of those who break them." *Cresswell* case, *supra.* It would be both incorrect and inequitable to hold that petitioner could refuse to furnish support to his wife and child, as he had bound himself by contract to do, and at the same time insist upon his rights under the Contract to have custody of his child.

None of the cases cited by petitioner in his second point appear to be pertinent to the facts in this case as appear borne out by the record.

POINT THREE.

The beginning of petitioner's third point appears to be nothing but a restatement and attempt to reargue purely questions of fact which were found against him by the lower

court. There was no overpayment by petitioner as alleged, and even if true, said alleged overpayment amounted to a mistake of law, for which there can be no recovery.

Respondent contends that the record conclusively shows that no overpayment was ever made by this petitioner. The separation agreement entered into between the parties provides that petitioner make his payments within ten days after receipt of income, the percentages to be governed by the income of the preceding year with adjustment to be made at the end of the year when the amount actually received had been determined. To this end, he is required to furnish respondent, or her attorney, with a sworn statement of his income on or before the 10th of the following January. The Trial Court ruled that, since this latter provision had not been complied with, evidence of the overpayment could not be introduced. In addition, respondent, when petitioner failed to submit the sworn statement, could only rely on petitioner's word and accept moneys which he sent to her relying upon his statement that these were the proper amounts.

The United States Court of Appeals for the District of Columbia ruled, and properly so, that it was not even necessary to consider these questions for the evidence which petitioner offered on the subject, all of which is found in the record, shows beyond any question that the amount which he claims was overpaid, was so paid because, in computing the amount due under the agreement, he included in his income for the year 1938 capital gains derived from the sale of securities which he now insists should not have been included. But if his position in this be conceded, and it is not, under the New York law which governs this agreement, such an overpayment is not recoverable where it was made, as is the case here, under a mistake of law. Petitioner knew what his income for the year 1938 was, knew what portion of it had been derived from the sale of securities, and knew what portion was payable to his wife. If anything, he misapprehended his legal rights under the contract, and the

New York courts will not grant relief for a mistake of law occurring with full knowledge of the facts. *Payne* v. *Witherbee, Sherman & Co.*, 200 N. Y. 572, 93 N. E. 954; *Adrico Realty Co.* v. *New York*, 250 N. Y. 29, 164 N. E. 732, 64 A. L. R. 1; *Childs* v. *Childs*, 263 App. Div. 946, 34 N. Y. Supp. (2d) 46. Also *Burne* v. *Van Raalte Company, Inc.*, 202 N. Y. App. Div. 189, 195 N. Y. Supp. 601.

It is denied that anything in the record can be taken to show that respondent has secured a double recovery or a prejudgment in any future cases which may be instituted by petitioner's refusal to comply with his agreement.

CONCLUSION.

It is respectfully submitted that no question is herein presented which warrants the granting of a writ of certiorari, and that the well reasoned opinion of the United States Court of Appeals for the District of Columbia shows that the petition for writ of certiorari is completely lacking in merit and should be denied.

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